INDEX.

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	5
Constitutional, Statutory and Procedural Rules Provisions Involved	6
Statement of Facts	13
Reasons Urged for Granting The Writ	15
Point One	
The Warrant To Search Was Issued On The Basis Of An Affidavit Containing Insufficient Information From Which To Make An Independent Determination Of Probable Cause, In Clear Conflict With Applicable Constitutional Standards	15
Point Two	
The Court Below Erred In Upholding The Search Of The Premises Located At #951 Southard Street Because Said Premises Were Not Mentioned In The Underlying Affidavit And Are Physically Separate From The Area Allegedly Used For An Unlawful Purpose	17
Point Three	
The Order Entered Permitting The State Reciprocal Discovery Is Violative Of Petitioner's Right To Remain Silent And His Right Against Self-Incrimination	18
Conclusion	19
Appendix	1a

TABLE OF CASES CITED.

PAGE

Aguilar v. Texas, 378 U. S. 108, 12 L. Ed. 2d 723 (1964) 15, 16

Beck v. Ohio, 379 U. S. 89, 13 L. Ed. 2d 142 (1964) 17

Brady v. Maryland, 373 U. S. 83, 10 L. Ed. 2d 215 (1963) 18

Cogen v. United States, 278 U. S. 221, 49 S. Ct. 118, 73 L. Ed. 275 (1928) 3

Cohen v. Beneficial Industrial Loan Corp., 337 U. S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528 (1948) 2

DiBella v. United States, 369 U. S. 121, 82 S. Ct. 654 7 L. Ed. 2d 614 (1962) 3

Dumbra v. United States, 268 U. S. 435, 69 L. Ed. 1032 (1925) 15

Griffin v. State of California, 380 U. S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965) 4

Hudson Distributors, Inc. v. Eli Lilly & Co., 377 U. S. 378, 84 S. Ct. 1273, 12 L. Ed. 2d 394 (1964) 4

Malloy v. Hogan, 378 U. S. 1, 84 S. Ct. 1489 4

Mercantile Nat'l Bank v. Langdeau, 371 U. S. 555, 83 S. Ct. 520, 9 L. Ed. 2d 523 (1963) 3

Nathanson v. United States, 290 U. S. 41, 78 L. Ed. 159 (1963) 17

Spevack v. Klein, 385 U. S. 511, 87 S. Ct. 625, 17 L. Ed. 2d 574 (1967) 4, 18

Spinelli v. United States, 393 U. S. 410, 21 L. Ed. 2d 637 (1968) 15, 16

State v. Bell, 89 N. J. Super. 437, 215 A. 2d 369 (App. Div. 1965) 3

	PAGE
State v. Contursi, 45 N. J. 422, 209 A. 2d 829 (1965)	3
State v. Fioravanti, 78 N. J. Super. 253, 188 A. 2d 308 (App. Div. 1963)	3
State v. Wade, 81 N. J. Super. 139, 214 A. 2d 411 (App. Div. 1965)	3
Swift & Co. Packers v. Compania Columbiana Del Caribe, S. A., 339 U. S. 684, 70 S. Ct. 861, 94 L. Ed. 1206 (1949)	2
United States v. Fratello, 44 F. R. D. 444 (S. D. N. Y. 1968)	4, 18
United States v. Hinton, 219 F. 2d 324, (7 Cir. 1955)	17
Williams v. Florida, 26 L. Ed. 2d 446 (1970)	19

STATUTES, RULES AND AUTHORITIES CITED

	PAGE
New Jersey Rules Governing Criminal Practice:	
R. 3:5-7	3, 8, 13
R. 3:13-3	9, 10, 11, 12, 14, 18, 19
New Jersey Statutes:	
2A:112-3	13
2A:121-3	13
Federal Statutes:	
28 U.S.C. § 1257 (3)	2, 3, 6
U.S. Constitution:	
Amendment IV	6
Amendment V	6
Amendment XIV	7

IN THE

Supreme Court of the United States

October Term, 1970
No. .

CHARLES I. COSTELLO,
Petitioner,

v.

STATE OF NEW JERSEY,
Respondent.

PETITION FOR WRIT OF CERTIORARI ON BEHALF OF CHARLES I. COSTELLO TO THE SUPERIOR COURT AND SUPREME COURT OF NEW JERSEY.

Petitioner prays that a Writ of Certiorari issue on behalf of petitioner Charles I. Costello from the judgment of the Superior Court of the State of New Jersey denying petitioner's motion to suppress illegally seized evidence and granting the State's motion for reciprocal discovery and the Orders of the Superior Court, Appellate Division, and the Supreme Court of New Jersey denying the petitioner's motion for appellate review. The Orders denying review are final in effect for the reasons hereinafter stated.

OPINIONS BELOW.

The opinions of the trial court on the motion to suppress and the State's motion for reciprocal discovery were given orally and have not been published. The text of the court's opinions appear in the Appendix portion of this petition.

JURISDICTION.

Jurisdiction in this court is invoked pursuant to 28 U. S. C. § 1257 (3). The Orders compelling the petitioner to produce certain information involving the preparation and presentation of his defense and denying petitioner's motion to suppress were entered by the trial court on March 24, 1970. The petitioner's motion for leave to appeal each decision, directed to the Superior Court of New Jersey, Appellate Division was denied by order dated May 7, 1970. The petitioner then moved the New Jersey Supreme Court for leave to appeal the Appellate Division's action. Denial of this motion was entered by order dated July 1, 1970.

The denials of petitioner's motions for leave to appeal by the Supreme Court of New Jersey and the Superior Court, Appellate Division were without opinion.

Petitioner notes that 28 U. S. C. § 1257, dealing with review of state court decisions by certiorari provides for relief from "final judgments or decrees rendered by the highest court of a State. . . ." Concededly, the Orders involved here were not final in the sense of a decision of the ultimate issue. However, Orders in advance of such a judgment which finally dispose of important rights in a collateral and independent proceeding have been accorded finality by decisions of this Court. *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528 (1948); *Swift & Co. Packers* v. *Compania Columbiana Del Caribe, S. A.*, 339 U. S. 684, 70 S. Ct. 861, 94 L. Ed. 1206 (1949). Petitioner submits that his motion to suppress unlawfully obtained evidence is a collateral and independent matter and the Order denying said motion is final with respect thereto.

The independent character of a motion to suppress is recognized by the New Jersey Rules Governing Criminal Practice, which require the motion to be raised in advance

of trial in an independent hearing. R. 3:5–7 (a). The reason for requiring the disposition of the issue prior to trial is to avoid involvement in collateral issues during the course of the trial. *State* v. *Wade*, 81 N. J. Super. 139, 214 A. 2d 411 (App. Div. 1965). Thus, a defendant will, ordinarily, be held to have waived any objection to the admission of evidence on the ground that such evidence was unlawfully obtained unless he makes a timely motion before trial. R. 3:5–7 (e).

Moreover, it is clear that the Order denying petitioner's motion to suppress constitutes a final disposition of that facet of the matter, for the New Jersey cases clearly indicate that when a motion to suppress has been made and denied, it becomes the law of the case and the question will not be reconsidered on a subsequent motion or at trial. *State* v. *Fioravanti*, 78 N. J. Super. 253, 188 A. 2d 308 (App. Div. 1963); *State* v. *Bell*, 89 N. J. Super. 437, 215 A. 2d 369 (App. Div. 1965); *State* v. *Contursi*, 45 N. J. 422, 209 A. 2d 829 (1965).

The rule in the federal courts differs in that the pre-trial disposition of the matter can be raised again at trial, thereby precluding finality. *Di Bella* v. *United States*, 369 U. S. 121, 129, n. 9, 82 S. Ct. 654, 659, 7 L. Ed. 2d 614, 620 (1962). This difference in practice distinguishes the instant case from *Di Bella* v. *United States*, *supra*, and *Cogen* v. *United States*, 278 U. S. 221, 49 S. Ct. 118, 73 L. Ed. 275 (1928), both of which hold orders denying pre-trial motions to suppress in a federal—as opposed to a state—criminal trial are not final for purposes of appeal.

Petitioner further submits that the reciprocal discovery Order and subsequent Orders denying leave to appeal are final within the meaning of 28 U. S. C. § 1257 (3).

This Court has held final and appealable orders which finally determine substantial rights which, if not promptly reviewed, will subject a party to irreparable harm. *Mercantile Nat'l Bank* v. *Langdeau*, 371 U. S. 555, 83 S. Ct.

520, 9 L. Ed. 2d 523 (1963); *Hudson Distributors, Inc.* v. *Eli Lilly & Co.*, 377 U. S. 386, 84 S. Ct. 1273, 12 L. Ed. 2d 394 (1964). Effectuation of the discovery Order will require disclosures by the petitioner at this time. Eventual reversal of that Order after trial will be of little comfort. The petitioner's claim of a personal constitutional right to remain silent in reliance on *Malloy* v. *Hogan*, 378 U. S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964); *Griffin* v. *State of California*, 380 U. S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965); *Spevack* v. *Klein*, 385 U. S. 511, 87 S. Ct. 625, 17 L. Ed. 2d 574 (1967); and *United States* vs *Fratello*, 44 F. R. D. 444 (S. D. N. Y. 1968) can be protected only at this stage of the proceeding. Disclosures once made cannot be recalled.

QUESTIONS PRESENTED.

1. Where The Warrant To Search Was Issued On The Basis Of An Affidavit Containing Insufficient Information From Which To Make An Independent Determination of Probable Cause, Did Not The Trial Court Err In Denying Petitioner's Motion to Suppress?

2. Did Not the Trial Court Err In Upholding The Search of the Premises Located at #951 Southard Street Because The Said Premises Were Not Mentioned In The Underlying Affidavit And Are Physically Separate From The Area Allegedly Used For An Unlawful Purpose?

3. Is Not The Rule of Court Conditioning the Petitioner's Right of Discovery In A Criminal Case On His Disclosure of Witnesses' Names, Statements Of Witnesses And the Production Of Photographs In His Possession, Unconstitutional On Its Face Because It Violates Defendant's Right To Remain Silent, And May Require Him To Give Evidence Against Himself, and Because It Requires The Relinquishment Of Certain Constitutional Safeguards In Exchange For An Attempt To Prepare An Adequate Defense?

CONSTITUTIONAL, STATUTORY AND PROCEDURAL RULES PROVISIONS INVOLVED.

28 U. S. C. § 1257.

State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

• • •

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.

U. S. CONSTITUTION.

Amendment IV—Searches and Seizures

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V—Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process; Just Compensation for Property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indict-

ment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.

Amendment XIV—Citizenship; Privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

NEW JERSEY COURT RULES.

New Jersey Court Rule 3:5-7. Motion for Return of Property and to Suppress Evidence.

(a) Notice; Time; Hearing; Briefs.

On notice to the prosecutor of the county in which the matter is pending or threatened and to the applicant for the warrant, if the search was with a warrant, and in accordance with the applicable provisions of R. 1:6-3 and R. 3:10, a person claiming to be aggrieved by an unlawful search and seizure and having reasonable grounds to believe that the evidence obtained may be used against him in a penal proceeding, may apply only to the Superior Court or county court of the county in which the evidence was obtained for the return of property seized and to suppress the evidence obtained, even though the offense charged or to be charged may be within the jurisdiction of a municipal court. A brief stating the facts and the arguments in support of the motion shall be submitted with the notice of motion. If material facts are disputed, testimony therein shall be taken in open court. Such motion shall be made within 30 days after the initial plea to the charge unless, the court, for good cause shown, enlarges the time. A motion made before trial shall be determined before trial. The motion may be made after trial has commenced only if the trial court finds that defendant could not reasonably have made it prior thereto.

(b) Return of Property.

If a motion made pursuant to this rule is granted, the property shall be delivered to the person entitled thereto, unless otherwise subject to lawful detention, and shall not be admissible in evidence in any court. Delivery of the property need not be made, however, until the expiration

of the time within which the State may obtain leave to appeal pursuant to R. 2:5-6.

(c) Consequences of Failure to Move.

If a timely motion is not made in accordance with this rule, the defendant shall be deemed to have waived any objection during trial to the admission of evidence on the ground that such evidence was unlawfully obtained.

(d) Effect of Irregularity in Warrant.

In the absence of bad faith, no search or seizure made with a search warrant shall be deemed unlawful because of technical insufficiencies or irregularities in the warrant or in the papers or proceedings to obtain it, or in its execution.

New Jersey Court Rule 3:13-3. Discovery and Inspection.

(a) Materials Discoverable by Defendant as of Right.

Upon motion made by a defendant, the court shall order the prosecuting attorney to permit the defendant to inspect and copy or photograph any relevant

(1) designated books, tangible objects, papers or documents obtained from or belonging to him;

(2) records of statements or confessions, signed or unsigned, by the defendant or copies thereof;

(3) defendant's grand jury testimony;

(4) results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the matter or copies thereof, which are known by the prosecuting attorney to be within his possession, custody or control;

(5) reports or records of prior convictions of the defendant.

(b) Materials Discoverable by Defendant in the Court's Discretion—Books, Papers and Tangible Objects.

Upon motion made by a defendant, which shall be as specific as possible under the circumstances, absent a showing of good cause to the contrary the court shall order the prosecuting attorney to permit the defendant to inspect and copy or photograph relevant books, papers, documents or tangible objects, buildings or places or copies thereof, which are within the possession, custody or control of the State.

(c) Materials Discoverable by Defendant in the Court's Discretion—Witnesses' Names and Statements.

Upon motion made by a defendant, which shall be as specific as possible under the circumstances, absent a showing of good cause to the contrary the court shall order the prosecuting attorney

(1) to disclose to the defendant the names and addresses of any persons whom the prosecuting attorney knows to have relevant evidence or information, and to indicate which of those persons he may use as witnesses;

(2) to permit the defendant to inspect and copy or photograph any relevant records of statements, signed or unsigned, by such persons or by codefendants which are within the possession, custody or control of the prosecuting attorney and any relevant record of prior convictions of such persons if known to the prosecuting attorney;

(3) to permit the defendant to inspect and copy or photograph any relevant grand jury testimony of such persons or codefendants.

(d) Discovery by the State.

If the court grants discovery or inspection to a defendant

(1) pursuant to R. 3:13-3(a) (4) or (b), it may condition its order by requiring the defendant to permit the State to inspect, copy or photograph any material within the scope of such paragraphs which the defendant intends to use at

trial and which are within his possession, custody or control, upon a showing of materiality to the preparation of the State's case and that its request is reasonable;

(2) pursuant to R. 3:13-3(e), it may condition its order by requiring the defendant to disclose to the prosecuting attorney the names and addresses of those persons, known to defendant, whom he intends to use as witnesses at trial and their written statements, if any.

(e) Documents Not Subject to Discovery.

Except as heretofore specifically provided, this rule does not authorize discovery by a party of reports, memoranda or internal documents made by any other party, his attorneys or agents in connection with the investigation, prosecution or defense of the matter or discovery by the State of records of statements, signed or unsigned, by a defendant made to defendant's attorney or agents.

(f) Time, Place and Manner of Discovery and Inspection.

An order of the court granting relief under this rule shall specify the time, place and manner of making the discovery and inspection and such terms and conditions as the interest of justice requires.

(g) Protective Orders.

(1) Grounds.

Upon motion and for good cause shown the court may at any time order that the discovery or inspection sought pursuant to R. 3:13-3(b), (c) or (d) be denied, restricted, or deferred or make such other order as is appropriate. In determining the motion, the court may consider the following: protection of witnesses and others from physical harm, threats of harm, bribes, economic reprisals and other intimidation; maintenance of such secrecy regarding informants as is required for effective investigation of criminal

activity; protection of confidential relationships and privileges recognized by law; any other relevant considerations.

(2) Procedure.

The court may permit the showing, in whole or in part, to be made in the form of a written statement to be inspected by the court alone, and if the court thereafter enters a protective order, the entire text of the State's statement shall be sealed and preserved in the records of the court, to be made available only to the appellate court in the event of an appeal.

(h) Time of Motions.

A motion under R. 3:13-3 shall be made after the indictment or accusation and within 30 days after the entry of a plea or at such reasonable later time as the court permits. The motion shall include all relief sought under this rule. Additional relief may be granted upon a subsequent motion only on a showing of good cause.

(i) Continuing Duty to Disclose; Failure to Comply.

If subsequent to compliance with an order issued pursuant to R. 3:13-3 and prior to or during trial, a party discovers additional material previously requested or ordered subject to discovery or inspection, he shall promptly notify the other party or his attorney or the court of the existence thereof. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, it may order such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other order as it deems appropriate.

STATEMENT OF FACTS.

On June 30, 1969, a judge of the Superior Court of New Jersey caused a warrant to be issued to "search the premises of J. C. Vending, Inc., 947 Southard Street, City of Trenton, County of Mercer, State of New Jersey, including the buildings comprising J. C. Vending, Inc. . . . [and], the commercial vehicles registered to J. C. Vending Corp. which may be found on the premises, and the colored male known as Charles Hunter Clark . . . ." The affidavit of A. M. Andaloro, a New Jersey State Police Officer, was the only matter before the judge at the time the warrant issued.

On July 1, 1969, a raid was conducted by state and local police on certain premises on Southard Street in Trenton, New Jersey, and various items were seized. The said premises are owned and occupied by the petitioner, Charles I. Costello, and leased in part, to J. C. Vending Machines, Inc., but the items seized were located at #951, an address not listed in the search warrant and premises not described in the application to search. Petitioner was subsequently indicted for conspiring to carry on and knowingly carrying on a lottery in violation of N. J. S. 2A:121–3 and N. J. S. 2A:112–3.

On March 6, 1970, after a full hearing challenging the adequacy of the affidavit underlying the warrant to search and the scope of the area to be searched as described by the warrant, the trial court denied petitioner's motion to suppress made pursuant to R. 3:5–7. At the hearing of this motion no evidence was adduced by either party as to the sufficiency of the affidavit. The argument as to sufficiency rests on the contents of the affidavit and the application of certain legal standards which petitioner contends are constitutionally required. Therefore, the contents of the affidavit will not be restated here but will be further discussed in Point One *infra*.

On the same date the trial court granted the State's motion pursuant to R. 3:13 3 (d) to require the petitioner to permit the State to inspect, copy or photograph results or reports of scientific tests or experiments; to examine books, papers, documents or tangible objects, buildings or places, which the petitioner intends to use at trial; and to disclose to the State the names, addresses and written statements of witnesses the petitioner intends to call at trial.

REASONS URGED FOR GRANTING THE WRIT.

Point One

The warrant to search was issued on the basis of an Affidavit containing insufficient information from which to make an independent determination of probable cause, in clear conflict with applicable constitutional standards.

The Fourth Amendment of the Constitution of the United States, as applied to the states by the Fourteenth Amendment, proscribes "unreasonable" searches and seizures. A search is unreasonable if based on a warrant issued without sufficient probable cause to believe that a crime has been committed and evidence of that crime is to be found at the place to be searched. *Dumbra* v. *United States*, 268 U. S. 435, 69 L. Ed. 1032 (1925).

If there was probable cause for the warrant in the instant matter to issue, it must have arisen from the only matter before the court at the time, the affidavit of A. M. Andaloro. Petitioner contends said affidavit fails to provide a basis upon which it may be said that probable cause existed for the issuance of the warrant, and the court below erred in holding otherwise.

First, the "informer" references are patently deficient. In *Aguilar* v. *Texas*, 378 U. S. 108, 12 L. Ed. 2d 723 (1964), this Court established two requirements to be satisfied before a magistrate may accept the allegations of allegedly "reliable" informers. These were amplified in *Spinelli* v. *United States*, 393 U. S. 410, 21 L. Ed. 2d 637 (1968) which explained that the affidavit in *Aguilar* was inadequate in that it failed to set forth any of the underlying circumstances necessary to enable the magistrate to independently judge the validity of the informant's conclusions or his reliability.

In the instant matter there is absolutely no information as to underlying circumstances from which the validity of the informant's tip could be weighed. Nor is there any attempt to support the claim that the informant was reliable. There is not even the barest attempt to show how the informer acquired his knowledge, whether by surmise, speculation or personal observation, nor any explanation of how he came to the conclusion that a lottery was being conducted.

Second, the affidavit contains the mere unsupported conclusions of a law officer that certain activities constitute a lottery operation. To allow the issuing judge to rely upon such conclusionary matter removes from his determination the ultimate question of whether the *facts* show probable cause. He abandons his neutral and detached function and serves as a rubber stamp for the police. *Aguilar* v. *Texas, supra.*

Third, the surveillance itself failed to demonstrate that a lottery was being conducted on the premises of the petitioner. The affiant attributes significance to the observation of envelopes and bags and states that use of such items is common in the operation of a lottery. But they are also common in the operation of a vending machine business. A similar issue arose in *Spinelli* v. *United States, supra,* where this Court refused to attribute any nefarious purpose to the fact that the premises to be searched contained two telephones, although telephones are frequently connected with gambling operations. Moreover, there are no facts set forth upon which to base a belief that the envelopes and bags, non-suspicious and neutral in themselves, contain lottery slips or relate in any matter to the operation of a lottery.

"Probable cause" has been said to depend on whether there are facts and circumstances within the knowledge of the issuing magistrate which are sufficiently trustworthy to warrant a prudent man in believing that a crime has been committed and evidence thereof is to be found at the place

to be searched. *Beck* v. *Ohio*, 379 U. S. 89, 13 L. Ed. 2d 142 (1964). Absent the allegations of the informant, which cannot properly be considered as heretofore noted, and laying aside mere suspicions, which can never be the basis for the issuance of a warrant, *Nathanson* v. *United States*, 290 U. S. 41, 78 L. Ed. 159 (1963), it is clear that a prudent man could not, on the basis of the present affidavit, conclude that a crime of lottery had been committed or that evidence thereof was to be found at the premises of J. C. Vending Machines, Inc.

Point Two

The Court below erred in upholding the search of the premises located at #951 Southard Street because said premises were not mentioned in the underlying Affidavit and are physically separate from the area allegedly used for an unlawful purpose.

It is clear from the Fourth Amendment's requirement of particular description that the area to be searched must be limited in the search warrant to the area believed to contain evidence of crime. *United States* v. *Hinton*, 219 F. 2d 324, 326 (7 Cir. 1955).

It must be understood that the area loosely described in the present affidavit as J. C. Vending Machines, Inc., comprises several buildings and outbuildings. The main building in the complex bears the address 947 Southard Street. This is the building described in the affidavit as having the sign "J. C. Vending Machines, Inc." in front. It is this building and one other nearby building, other than #951 to which the affidavit refers when describing the comings and goings of Charles Clark. The building at #951 is some forty feet away from #947, a chain link fence forming a common perimeter between the two properties.

Although the affidavit reflected no showing or belief that #951 was involved in the alleged criminal activity, the warrant issued embraces all buildings and things generally surrounded by or accessible from the fenced area. No

suspicious conduct being observed in or around #951, the petitioner, as owner of said property, contends he is aggrieved by the illegal search thereof.

Point Three

The order entered permitting the State reciprocal discovery is violative of Petitioner's right to remain silent and his right against self-incrimination.

Petitioner contends that R. 3:13-3(d) is unconstitutional on its face insofar as it conditions petitioner's right of discovery on a reciprocal opportunity for discovery by the State. The trial court held that this did not violate any right personal to the petitioner because, as it said, the petitioner has no right to pretrial discovery.

To deny the petitioner the opportunity for discovery merely because he chooses to exercise his constitutional right to remain silent imposes a penalty on the exercise of that right. Benefits or privileges may not be conditioned on the abandonment of constitutional rights. *Spevack* v. *Klein*, 385 U. S. 511, 17 L. Ed. 2d 574 (1967).

The reasoning of *Spevack* v. *Klein*, *supra*, was applied to the issue of criminal discovery in *United States* v. *Fratello*, 44 F. R. D. 444 (S. D. N. Y. 1968) in which the court held that a rule which exacts a penalty as an alternative to the exercise of the privilege of discovery violates the Fifth Amendment.

Moreover, it is quite clear that there is a constitutional right to discover exculpatory material. *Brady* v. *Maryland*, 373 U. S. 83, 10 L. Ed. 2d 215 (1963). It would therefore seem that much of the information described in R. 3:13-3 (a), (b), and (c) must be disclosed in all events. Petitioner should still be able to assert such discovery rights for favorable evidence independent of the Rule without triggering any reciprocal discovery.

The constitutionality of New Jersey's reciprocal discovery rule has not been previously adjudicated. Petitioner

notes, however, that this Court has recently decided *Williams* v. *Florida*, 26 L. Ed. 2d 446 (1970) wherein it was held that Florida's notice-of-alibi rule, which requires a defendant to give pretrial notice of a claim of alibi and information as to the place he claims to have been and witnesses he intends to use, did not violate the defendant's Fifth Amendment privilege against self-incrimination.

Williams, supra, is not controlling here for several reasons. Firstly, the raising of an alibi defense creates special needs that it be disclosed to the prosecutor at pretrial because the defense is particularly liable to be sprung as a surprise insofar as it is easily asserted. *Williams* v. *Florida, supra,* at p. 450.

Moreover, a claim of alibi is an affirmative defense and evidence supporting it should not be helpful to the State in establishing a prima facie case. R. 3:13–3 (d), however, requires disclosure of petitioner's case generally and such evidence, while appearing exculpatory at pretrial, might later seriously damage petitioner's case and aid the State's case in chief.

CONCLUSION.

For all of the foregoing reasons, the petitioner respectfully requests that certiorari be granted in the instant matter.

Respectfully submitted,

George Pellettieri,
Attorney for Petitioner,
Charles I. Costello.

APPENDIX.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION—MERCER COUNTY
(CRIMINAL)

THE STATE OF NEW JERSEY,

vs.

CHARLES I. COSTELLO,
CHARLES HUNTER CLARK,
et als.,

Defendants.

Indictment No. SGJ 1-69-12.

MOTION.

Before: HONORABLE SAMUEL D. LENOX, JR., J. C. C.

Place: MERCER COUNTY COURTHOUSE
TRENTON, NEW JERSEY
March 6, 1970

APPEARANCES:

GEORGE F. KUGLER, JR., Esquire, Attorney General of the State of New Jersey, by

DONALD HOROWITZ, Esquire, Special Deputy Attorney General, attorneys for the State of New Jersey.

PELLETTIERI & RABSTEIN, Esquires, by GEORGE L. PELLETTIERI, Esquire, attorneys for Defendant, Charles I. Costello.

LEON M. ROBINSON, Esquire, attorney for Defendant, Charles Hunter Clark.

Opinion—State's Motion For Reciprocal Discovery.

THE COURT: I have no problem with it. The right to discovery by the defendant is given by rules, but it is not a constitutional right. The defendant cannot be compelled to give anything. All he has to do is forego his own right to discovery. It is a reciprocal rule. It is preceded by the statement, "If the Court grants discovery or inspection to the defendant," and that can only come about by the defendant first making an application, and if there is something in that respect he doesn't want to disclose to the State, he need only not make an application to have the State's evidence produced to him and accordingly he has no problem. So on the constitutional issue I dispose of it by saying I see no merit to it.

Now, Mr. Horowitz, you are requesting a reciprocal order under Section (d) for any scientific tests or experiments made upon and related to the intercom system and the garbage disposal unit and for a list of witnesses in the language of Section 2 under part (d) of that rule. Is that all you are asking for?

MR. HOROWITZ: Yes, sir.

THE COURT: I will grant it. Submit an order.

Opinion—Motion to Suppress.

THE COURT: This motion comes before the Court under Rules Governing Criminal Practice 3:5-7, which reads:

> "On notice to the prosecutor of the county in which the matter is pending or threatened and to the applicant for the warrant, if the search is with a warrant, * * * a person claiming to be aggrieved by an unlawful search and seizure and having reasonable grounds to believe that the evidence obtained may be used against him in a penal proceeding, may apply only to the Superior Court or county court of the county in which the evidence was obtained for the return of property seized and to suppress the evidence obtained——.
>
> "In the absence of bad faith, no search or seizure made with a search warrant shall be deemed unlawful

because of technical insufficiencies or irregularities in the warrant or in the papers or proceedings to obtain it, or in its execution."

I read the latter rule as a prefatory comment. I am fully appreciative that no court rule can in any way delete or infringe upon constitutional rights which a defendant has.

This being a search with a warrant, the warrant is presumed to be valid and the burden of proof is upon the defendant to show the invalidity of the search. State versus Gaudiosi, 97 New Jersey Superior 565, at page 571, said:

"In a situation where the challenged search was made under the authority of a search warrant, the warrant is presumed valid and the burden of establishing its invalidity rests upon defendant," citing, "State versus Mark, 46 New Jersey 262, 273 (1966)." With reference to the conversion situation the court continued. "But where, as here, the search was without a warrant and the legality of the search depends upon existence of probable cause or alternatively the defendant's voluntary consent to the search, the burden of proof is on the State," citing, "State versus Contursi, 44 New Jersey 422, 425 (1965)," and other cases set forth in the opinion.

Now, preliminarily, I think it is appropriate that I allude to comments of Chief Justice Weintraub of the New Jersey Supreme Court in State versus Andrew Gerardo decided February 17, 1969. I don't have the citation handy. The Chief Justice said:

"The issue must be considered in the context of the values involved. It is an unhappy fact that the capacity of the judicial process to deal with the demands of law enforcement is doubted by a substantial body of responsible men. The reasons are several. One is the lengthening line of decisions which suppress the truth or block access to it. It is idle to suppose, as some do, that those decisions have no impact upon law

enforcement or at the worst only a minimal one. The realities abound the other way. Nor should the topic be obscured by invoking the presumption of innocence. The presumption has no role on a motion to suppress. Such motions are not made for an academic end. The purpose is to suppress proof which will likely convict, so the defenders will go free.

"It bears repeating that the first right of the individual is to be protected from criminal attack. That is the reason for government. The responsibility to that end rests no less upon the judiciary than upon its coordinate branches. If the judiciary exerts its undoubted power to create new constitutional doctrines, it must first learn what authority the other departments must have. The need must be found, not in abstract contemplation, but in the tumult of the streets. Cliches and slogans will not do. So it throws no light to inveigh against a police state. It would be a bit absurd to say ours was a police state before, let us say, Mapp versus Ohio, * * * or to deride in such terms every nation which does not suppress the truth (if indeed there is any which does).

"All the competing rights involved belong to the individual. The State has none—it has only duties, and powers with which to discharge them. To set criminals free is to exact a price, not from some pain-free societal entity, but from innocent individuals who will be their next victims. There are other hurts as well, for the suppression of proof of guilt must weaken respect for the reach of the law, thereby increasing the toll of victims and injuring as well those offenders who might have been deterred from a career of lawlessness. Some would add their belief that current doctrines tend to corrupt officials who, struggling to cope with the duty realities of crime, strain to bring the facts within unrealistic concepts. These trespasses upon the first right of the individual to be protected from

attack should not lie suffered unless it is plain that some larger individual value is served.

"The question then is whether there is such other value here which rises above the first right of the individual. If not strictly relevant, it is at least noteworthy that the evidence we are asked to suppress relates to syndicated crime, for it is syndicated crime which, above all other, has found a haven in the suppression of the truth. * * *

"The Fourth Amendment does not call for the suppression of evidence obtained in violation of its provisions. The doctrine of suppression is judge-made, a device adopted upon the belief that there was no effective remedy for a violation of its terms. Suppression is ordered, not to rectify a wrong already done, but to deter future violations," citing Elkins versus the United States."

In that case Chief Justice Weintraub then quotes and says:

"The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effective available way—by removing the incentive to disregard it."

Again Justice Weintraub speaking:

"The purpose, then, is to deter insolence in office. To that end, the suppression of the truth is tolerated even though the price will be paid, as we have said, by the defendant's next victim. But it would be a waste of the individual's first right, his right to be protected from crime, to set the offender free when there is no trace of official arrogance. * * * In these circumstances we see no justification for the suppression of the truth. It is appropriate to repeat from United States versus Wallace and Tiernan Company * * *, that 'The Fourth Amendment, important as it is in our society, does not

call for imposition of judicial sanctions where enforcing officers have followed the law with such punctilious regard as they have here.' A search under warrants thus obtained cannot be denounced as 'unreasonable,' the ultimate test under the Amendment," citing State versus Boykins.

As I say, those are preliminary comments by me which I make primarily because this search warrant was issued by Judge Kingfield on a State Police warrant and I do not mean by any comments therein to indicate any identity of facts or otherwise between those comments and the case at bar.

Now, most important in this case, I think, is the fact that this warrant was issued not by a magistrate, but by a Superior Court assignment judge.

State versus Kasabucki, 52 New Jersey 110, a Supreme Court opinion written by Justice Francis and returned June 28, 1968, contains some very binding directions upon county and Superior Court judges in such instances and the language of the opinion consisting, of course, with the protection of the defendant's constitutional rights, I feel is quite strong and it is a very persuasive matter to me and accordingly I will read at length that portion of the opinion to which I am alluding. Justice Francis said:

"As we have noted on a number of occasions, the Federal and State Constitutions do not bar all searches and seizures. They bar only those that are 'unreasonable.' * * * A basic purpose of the framers of this important right was to protect the citizens against unwarranted invasion of his home by police officers. The intention was to impose an obligation on police officers, except in unusual situations which need not be discussed here, not to search a person's home until they have presented their estimate of probable cause for the search to the detached scrutiny of a neutral judge, and obtained his formal authorization to do so. * * *

"When the police officer does not rely on his own evaluation of the facts, but submits them to the independent judgment of a judicial officer for his determination as to whether they add up to probable cause, a search pursuant to a warrant issued by a judge cannot be equated with 'insolence in office' or abuse of the officer's police power, nor can it be said reasonably that the citizen's Fourth Amendment security rests only in the discretion of the police. • • • Thus when the adequacy of the facts offered to show probable cause is challenged after a search is made pursuant to a warrant, and their adequacy appears to be marginal, the doubt should ordinarily be resolved by sustaining the search. • • • That is because the warrant provides clear evidence of the legitimacy of the officer's purpose. The decisions bespeak the preference accorded a search authorized after the facts and inferences therefrom have been subjected to neutral judicial consideration and found to constitute probable cause for it.

"'Probable cause is a flexible nontechnical concept. It includes a conscious balancing of the governmental need for enforcement of the criminal law against the citizens' constitutionally protected right of privacy. It must be regarded as representing an effort to accommodate those often competing interests so as to serve them both in a practical fashion without unduly hampering the one or unreasonably impairing the significant content of the other. • • • Thus, although incapable of precise definition, the term has been construed to signify less evidence than would be required to establish guilt of the crime for which the warrant is sought. • • • It means something more than 'raw unsupported suspicion.' It is a suspicion of guilt that is well-grounded; a reasonable basis for belief that a crime has been or is being committed. • • • A finding of probable cause may rest upon evidence not competent at a criminal trial. • • • Hearsay is an adequate

basis for the finding and the issuance of a warrant, so long as there is something coupled with the hearsay to give it reasonable credit, something which gives it the appearance of trustworthiness. * * * When a police officer seeking a search warrant presents the basis therefor in affidavit form to a judge for evaluation on the issue of probable cause, the judge's approach must be a practical and realistic one. The officer's statements must be looked at in a common sense way without a grudging or negative attitude. There must be an awareness that few policemen have legal training and that the material submitted to demonstrate probable cause may not be described with the technical nicety one would expect of a member of the bar. Moreover, the judge should take into account the specialized experience and work a day knowledge of policemen. * * * The facts asserted must be tested by the practical considerations of everyday life on which reasonably prudent and experienced police officers act. * * * Once the judge has made a finding of probable cause on the proof submitted and issued the search warrant, a reviewing court, especially a trial court, should pay substantial deference to his determination. In fact, another trial judge of equal jurisdiction should regard as binding the decision of his brother that probable cause had been sufficiently shown to support a warrant, unless there was clearly no justification for that conclusion."

To the same effect is the earlier case of State versus Mark, 46 New Jersey 273, where Justice Jacobs said the issuing judge's finding that probable cause existed will be considered as a substantial factor tending to uphold the validity of a warrant and that his action in issuing it will not be upset on appeal though the matter be viewed as a close one.

Chief Justice Weintraub's comments were somewhat stronger than those of Justice Jacobs because Chief Justice Weintraub said that one trial court should review the

decision of his brother on the bench as being binding unless there was clearly no justification for that conclusion.

Now, the issue before the Court in viewing this application for the search warrant is whether there was in fact probable cause for the issuance of the warrant. Counsel have attacked the affidavit in support of the search warrant primarily, although not exclusively upon the basis of the Spinelli case, William Spinelli versus United States, which requires no citation. The Spinelli case was an extension, an explanation of the Aguilar case, Aguilar versus Texas, and the Spinelli case directed its criticism to a search warrant which was granted by a judge on the basis of what was alleged to be a reliable tip supported by further investigation and surveillance by the F. B. I.

I don't believe that the Spinelli case is applicable here because I don't believe that the informant's tip was used as a basis for the issuance of the search warrant.

In Spinelli the issue was pointed up by Justice Harlan where he said:

> "At this stage as well, however, the standards enunciated in Aguilar must inform the magistrate's decision. He must ask: Can it fairly be said that the tip, even when certain parts of it have been corroborated by independent sources, is as trustworthy as a tip which would pass Aguilar's tests without independent corroboration?"

The emphasis, as indicated by Mr. Robinson, in the Spinelli case is on the tip, but there was no intention that if the tip were eliminated from the affidavit in support of the search warrant and probable cause still existed that the warrant would be void because it contained information with respect to an informant's information, unreliable though it may be.

Mr. Justice White in a concurring opinion said this:

> "If an officer swears that there is gambling equipment at a certain address, the possibilities are (1) that he has seen the equipment; (2) that he has observed or perceived facts from which the presence of the equipment may reasonably be inferred; and (3) that he has obtained the information from someone else."

Repeating again: No. 1 is that he had seen the equipment and thereafter with respect to this Justice White's opinion says, "If one is true the affidavit is good." That certainly is obvious.

No. 2, that he set forth was that he has observed or perceived facts from which the presence of the equipment may reasonably be inferred, and Mr. Justice White then with respect to that says, "But in 2 the affidavit is insufficient unless the perceived facts are given for it is the magistrate not the officer who is to judge the existence of probable cause."

Then 3 refers to the tip.

Now, I believe we are dealing here with a No. 2 situation and it is necessary that the affidavit state the perceived facts for the magistrate to judge the existence of probable cause and that is what we have in this lengthy affidavit.

I do observe that Spinelli is a controversial decision. Spinelli was a five-three decision with Justice Black, Justice Fortas and Justice Stewart dissenting. Justice Black and Justice Fortas wrote dissenting opinions and Justice Black began his dissenting opinion with I think a very loud opening salvo when he said:

> "In my view this Court's decision in Aguilar versus Texas * * * was bad enough."

Mr. Justice Marshall abstained from that opinion, and Justice Harlan's decision was supported by four of his fellow judges.

The opinions which have been returned by the various circuit courts and district courts of the United States since the return of the Aguilar opinion have been varied in their approaches to the problem and I am sure there will be further opinions from the Supreme Court which will explain, perhaps limit but certainly explain the Spinelli case.

I read not too long ago in 6 Criminal Law Reporter 2310 the case of Bridges against the United States. That was decided December 19, 1969, by the Eighth Circuit Court of Appeals. It involved a contention by the defendant that the affidavit failed to establish the reliability of the informers and failed to set forth the underlying circumstances necessary to enable the commissioner to judge the validity of the informer's statements, those statements being set forth in a search warrant which was attacked. In the text the court in this connection said:

> "We reject the defendant's first contention. The affidavit specifically states that the information furnished to Patch came from informants who had on numerous occasions given information to him which had proved to be reliable. The statement sufficiently establishes the reliability of the informants."

I recognize that is a circuit court and not the Supreme Court, but this case does not stand alone in this philosophy but rather is one of a considerable number of cases, but I must confess that there are to the contrary other circuit court opinions and district court opinions. Exactly what will be done with them I don't know. Our Supreme Court is a changing court and there are those who would believe that the Spinelli case will be considerably limited.

I observe that there is in the present affidavit in support of the search warrant on Page 2 a statement, "On April 24, 1969, a confidential informant who has given information that has proved reliable in the past advised," and so forth. And later on in the affidavit on Page 5 there is a second reference to an informer, no statement as to whether it

was the same one, but I observe that this reference to the informant occurred after much of the surveillance had already been conducted and then again you will find stated; "On May 14, 1969, a confidential informant who has given information that has proved to be reliable in the past advised me," and so forth.

An argument could be presented that these statements are entitled to weight, but I view this affidavit on the basis of the information given by the confidential informant, or informants as the case may be, as no more than the moving force which caused the investigation to be conducted which investigation forms the basis for the application for the search warrant.

With that approach to this problem I must then view the search warrant in its entirety, giving no weight to the information supplied by the confidential informant which I assume is what Judge Kingfield did since I know personally that he is familiar with the Spinelli case we having discussed it at the Judges' luncheon and on many other occasions and Judge Kingfield is, of course, not a county judge as I am, he is not merely a Superior Court judge, but he is one of a very select few assignment judges in charge of a three-county vicinage of Mercer County, Somerset County and Hunterdon County, and all of the judges of every level contained within those counties. Judge Kingfield has also been for a considerable period of time almost the sole judge to issue warrants for the New Jersey State Police in this area and vicinage, he is one of I believe two judges who has been assigned for the determination of the existence of probable cause for the issue of wiretaps under the new legislation authorizing such warrants to be issued and he has vast experience on this subject and in this field.

There is contained in this warrant, in this application for the search warrant, the affidavit, a considerable amount of factual information. The rules of evidence do not apply to an affidavit in support of a search warrant. They can

contain hearsay, they can contain a great deal of information which if in common sense warrants weight being given to it can be considered and weight can be given by the issuing judge or magistrate.

There is contained information with respect to prior arrests of the individuals whose activities were observed by the affiant. There is shown therein a statement with respect to prior arrest records of Horace Lee Shivers whose activities are described in the affidavit, Francis Ventigli, the defendant, Charles Hunter Clark, and one J. Mapp.

As mentioned by counsel for the State, in State versus Burnett, 42 New Jersey 387, there is a comment that such matters can be given probative effect where the Court there said:

> "For example, hearsay will do if coupled with something to give it credit, and evidence deemed too dangerous at trial, i.e., prior arrests and convictions, may be accorded probative effect."

There is also contained in the affidavit after a six page recitation of facts observed during the surveillance an opinion or conclusion of the affiant, New Jersey State Trooper, as to the meaning of the activities which he observed. In that connection the affidavit reads:

> "I have been a police officer for five years and during this time I have conducted numerous gambling investigations of this type. In my previous experience as a police officer, I have observed lottery operations of this type to be generally conducted in a similar manner. Bets received by the writers are recorded on slips of paper which are retained by the writer until they are turned over to a collection man usually called a runner who after gathering slips from the writers transports all of the slips to the drop or bank. Paper bags, and envelopes are common containers used in the transportation of these slips. The hours of surveillance of the aforementioned persons transporting and deliver-

ing paper bags and envelopes are indicative of the unusual hours of delivery of the slips to the bank or drop."

Judge Kingfield knows as I have learned through the trial of a considerable number of gambling cases myself what type of activities are customarily conducted in the operation of a gambling venture of this nature. I have observed as recently as the trial which I just concluded, consuming three weeks and involving four defendants engaged in an operation the activities of which were very similar to that, which is set forth in the affidavit in supporting of the search warrant activities involving the same type of transportation of white envelopes and small brown bank envelopes and paper bags, of carrying from one place to another in the operation of a drop, of the hours when the activity takes place, and it is to be noted the police officer said the hours of surveillance because activities of this nature conducted at six o'clock at night would negate an inference that this was a gambling activity. It is one of many, many matters which can be taken into consideration.

I have had on innumerable occasions marked into evidence, and I know Judge Kingfield is familiar with this type of thing, bank envelopes containing slips and paper bags containing large numbers of memorandums of lottery policy bets and horse bets.

These are matters which, of course, can be used in connection with legitimate enterprises, they can be used by housewives going shopping, but the validity of an affidavit and the finding of probable cause must be taken from the four corners of the warrant, the affidavit in support of the warrant.

As indicated previously in the Kasabucki case from which I read, the expertise and the knowledge of police officers in recognizing gambling activities is a factor to be taken into consideration and in viewing the matter as I now view it, I take into consideration not only the expertise of the police

officers but the expertise of the assignment judge who issued the warrant.

I think also the fact that the premises were surrounded as they were with a chain link fence must be taken into consideration. There are many legitimate reasons for that, but there are also reasons which would together with all the other facts support an inference to the contrary. I take into consideration the fact that this investigation and the application for the warrant was conducted not by a small local police force, but by the New Jersey State Police. While it is a small factor it is something to be taken into consideration.

I don't know of any activity which is legal which could be conducted in the manner that the activities which are described in this affidavit could be conducted, but I suppose that it is entirely possible that people would travel from spot to spot as was indicated here and then after obtaining certain things in paper bags ride by without stopping and throw them out the window and have someone come from behind a high chain link fence and pick them up and take them inside, but it is certainly a factor which should be considered in weighing the overall affidavit.

There is in this affidavit no direct as opposed to circumstantial of an operation. Unquestionably, if the evidence which is in this affidavit were presented to a court of law in its present form without a search warrant having been executed to obtain additional information, the State would not have established a case sufficient to authorize conviction even if everything contained herein is true. But as I previously mentioned in I believe it was the Kasabucki case, probable cause does not require such a level of proof.

The Burnett case at Page 387 discusses this same question where it says:

> "In dealing with probable cause, however, as the very name implies we deal with probabilities. These are not technical; they are the factual and practical

considerations of everyday life on which reasonable and prudent men, not legal technicians act. The standard of proof is accordingly correlative to what must be proved.

"'The substance of all definitions' of probable cause 'is a reasonable ground for belief of guilt.' And this 'means less than evidence which would justify condemnation' or conviction—."

As Marshall, chief justice for the court more than a century ago, observed in Locke versus the United States:

"Since Marshall's time, at any rate, it has come to mean more than bare suspicion: Probable cause exists where 'the facts and circumstances within the officer's knowledge, and of which they had reasonably trustworthy information, are sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed."

As I read this affidavit had I no information with respect to an informer and had I read the affidavit from beginning to end without having seen that information with respect to the informant and before I reach that point in the affidavit where the police officer gives his opinion had someone asked me what is this indicative of I would have said that it was indicative of a numbers operation because I recognize myself the familiar pattern of what is set forth in this affidavit as having been presented before me in so many cases in which there have been convictions.

You can't talk just about what was seen at the J. C. Vending Machine premises, but we must view the entire affidavit which activities described therein had their culmination at the J. C. Vending Machine premises. There is a pattern to it. There is obviously an activity described here which was a regular activity, which was an activity which was engaged in by a number of people and an activity which although contrary inferences could be drawn led me to believe and obviously led the police officers and

obviously led Judge Kingfield to believe represented the illegal activity which the State alleges in the indictment was being conducted.

It is not necessary for there to be evidence in the surveillance of actual slips having been seen or actual bets having been made or taken. If a police officer sees a man with a bottle cap and a flame under the bottle cap and hypodermic needle, he doesn't have to see heroin to know the man is using heroin. There are certain circumstances which point to an illegal activity which are short of direct evidence of that activity being conducted and it is the probable cause to believe it from the information which justified the issuance of the warrant.

I think the affidavit does clearly establish probable cause for the issuance of the warrant. The warrant was issued for premises designated as follows: "the premises of J. C. Vending, Incorporated—." I should not go to that, I suppose, before I touch upon the defendant part specifically since he has also made a motion.

The activities of the defendant Clark are described in the affidavit in a manner which shows that he was an integral part of whatever activities were being conducted and culminating at the J. C. Vending Machine property. Mr. Clark's activities are described in the warrant and the warrant which was issued said the "colored male known as Charles Hunter Clark hereinbefore described in the J. C. Vending premises or on the public street of Trent, City of Trenton, County of Mercer, State of New Jersey."

The warrant described Clark as being approximately forty years, six feet tall, mustache and so on. This affidavit is so long and the hour is so late that I am not going to attempt to marshal all of the facts as they relate to Clark, suffice it to say that his connection I have probable cause to believe he had in his possession information or paraphernalia, lottery slips or paraphernalia shown therein.

The warrant for the premises described the premises as:

> "— the premises of J. C. Vending, Incorporated, 947 Southard Street, City of Trenton, County of Mercer, State of New Jersey, including the buildings comprising J. C. Vending, Incorporated, which are generally surrounded by the chain link fence or which are accessible from within the fenced area of J. C. Vending property, the commercial vehicles registered to J. C. Vending Corporation which may be found on the premises—."

The premises in question were inaccessible to police officers other than by the surveillance which they were able to conduct from the exterior of the premises. They obviously went to a considerable amount of trouble in this connection. I was going to allude to the aerial photograph, but I guess there is no evidence before me that was taken during the course of the surveillance so I will not do so. The evidence indicates that the activities being conducted were being conducted within the confines of a chain link fence. The affidavit described activities in the vicinity of the front of the premises.

The defendant Clark and the bags which are described in the affidavit in support of the search warrant was observed in the area of the yellow garage which has been marked 3 on the aerial photograph, the main building of the J. C. Vending Machine Company marked 1 on the photograph, and the yellow garage in the rear marked 2 on the photograph, but there is no indication in the affidavit of any direct activities in the area of 4A or 4B buildings marked on the photograph.

Now, I have no hesitancy whatsoever in saying that a search of the premises or issuance of a warrant for premises marked 4A on the front of which is written, "Trans World Wig Company," I believe, is not authorized by the affidavit. Clearly, the lack of activity in that area of a nature warranting conclusion that probable cause to believe that the illegal

activity was being conducted and the presence of the name of a completely unrelated company on the front of the building would negate any reason for a search warrant being given to search that building.

Now, I think if there is probable cause to believe that with this premises surrounded as it was with the chain link fence constituting an area of apparent business enterprise and with the activities observed being at various areas of this large complex, there is probable cause to warrant the issuance of a search warrant to search all portions thereof which are under the possession and control of the J. C. Vending Machines, Incorporated, which was the name on the front of the premises and the name of the trucks that were going in and out of the premises and so forth.

The Ratushny case sets forth the law with respect to limitation of the area to be searched in the warrant based upon the constitutional protection against unlawful searches and seizures. The Ratushny case involved an apartment building with a warrant describing the entire apartment building when in fact only one apartment was to be searched and the Court correctly held that it is immaterial that only one apartment, the one they were discussing, was searched.

It is the warrant itself which is to be used in determining whether it is legal or void because if the warrant authorizes a greater search than is warranted by the probable cause shown in the affidavit in support of the search warrant, then the danger to an innocent citizen exists and that voids the warrant.

Ratushny said that where the premises reasonably believed to house illegal activities are known or reasonably should have been known by police to be premises utilized for occupancy of more than one family the search warrant must contain as specific a description of the particular area to be searched as the nature of the circumstances reasonably permits.

Now, this area being confined as it is to a complex surrounded by a chain link fence and inaccessible and there being no evidence before me to the contrary, I assume that all of this property is owned by the J. C. Vending Machine Corporation. I don't know how the officers could reasonably have been expected to have known if it is a fact that any of the area was not owned and in possession of J. C. Vending with the exception of that wig store.

I recognize there is nothing in the affidavit in support of the search warrant which names Mr. Costello as having been seen or engaging in any of the activities which are described therein and I don't know whether there is evidence before me or not, but it was stated during argument that he occupies an apartment on the second floor of Building No. 1.

I feel that the warrant as it is written limits the authorization to search to premises of J. C. Vending, Incorporated. It specifically described 947 Southard Street, which I understand is the number on the building marked No. 1 on the aerial photograph. In the absence of giving other numbers I note that Charles Costello, Jr., who testified himself did not know the number of Building No. 3 if it in fact contained another number. In the absence of another number described further the buildings of J. C. Vending, Incorporated, by stating:

> "—including the buildings comprising J. C. Vending, Incorporated, which are generally surrounded by the chain link fence or which are accessible from within the fenced area of J. C. Vending property—."

There is nothing in there that says excluding the Trans World Wig Shop, but there is nothing including it either other than a statement which might be argued to include it which says accessible from within the fenced area, but I think that must be read in conjunction with the statement, "buildings comprising J. C. Vending, Incorporated," and earlier in the search warrant the statement, "premises of J. C. Vending, Incorporated."

So I conclude first of all that the building marked 4A on Court's Exhibit No. 1 is not included in the warrant and any search thereof, if there was in fact such a search, would not be authorized by the warrant and would be a warrantless search.

The main question to me, probably not to defense counsel, is the building marked 4B and it is accessible from within the fenced area of the J. C. Vending property as stated in the search warrant. It appears from the aerial photograph to be no more accessible or inaccessible than the Trans World Wig Shop, however.

The evidence is to the effect that it was not rented to another, but was used for J. C. Vending business and was in the possession of J. C. Vending business, I conclude that from the testimony of Mr. Costello. The warrant in my opinion described and authorized a search of everything within the red markings on Court Exhibit 1 except Building 4A, and that there was probable cause sufficiently presented in the affidavit before Judge Kingfield to authorize the warrant to be so issued as requested by the affiant. Accordingly, the motion is denied.

The State will submit the order.

MR. HOROWITZ: Yes, sir.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION—MERCER COUNTY
(CRIMINAL)

THE STATE OF NEW JERSEY,

vs.

CHARLES I. COSTELLO,
CHARLES HUNTER CLARK,
et als.,

Defendants.

CERTIFICATE.

I, Albert M. Bernstein, C.S.R. one of the Official Court Reporters in and for the State of New Jersey, certify that the foregoing is a true and accurate transcript of my original stenographic notes, to the best of my knowledge and belief.

/s/ ALBERT M. BERNSTEIN

Dated: April 20, 1970.